No. 15211

United States Court of Appeals

For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant,*

vs.

THE CITY OF TACOMA, a Municipal Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
THE HONORABLE GEORGE D. BOLDT, *Judge*

PETITION FOR REHEARING *EN BANC*

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PETITION FOR REHEARING *EN BANC*

Appellant moves for a rehearing of this case and that the same be heard before the full Court *en banc* on the following grounds:

The holding of the Court in syllogistic form is:

1. Property rights are protected from appropriation by a state agency by the Fourteenth Amendment.

2. Aboriginally held Indian property (unprotected by treaty) is not of sufficient dignity to be called property.

3, Therefore, the Fourteenth Amendment does not prevent a state agency from inundating graves, fishing rights, etc., so held and the corollary that the Federal Courts have no jurisdiction under that theory follows.[1]

[1]The Fourteenth Amendment in and of itself is sufficient to confer jurisdiction, *Iron Mountain etc v. City of Memphis,* 96 Fed. 113; *Coyahoga River etc. v. City of Akron* 240 U.S. 462; *Portland R.R. v. City of Portland,* 181 Fed. 632, appeal dismissed 218 U.S. 686.

Stated in such a fashion (and we believe such is the holding of the Court) the foregoing is not logical, or in accordance with the law:

First, the *Walapai case,* 314 U.S. 339 (1941) is an aboriginal rights case. The aboriginal rights of the Indians survived the railroad grants by patents from the United States, *ergo,* such aboriginal rights have dignity, and are "property." It will not do to say it is an "executive order" case, because it concerned land both inside and outside the so-called reservation created by the executive order, and therefore is an "aboriginal rights" case.

Second, assuming that aboriginally held lands have dignity, then the Fourteenth Amendment prevents the City from dispossessing plaintiff.

Third, can the addition of the United States as a guardian enhance the dignity of the land-ownership rights of the Indians? Certainly a guardian has only such rights as its ward has. And so, the *Walapai* case, 314 U.S. 339, is more persuasive than ever, because, after all, the Indians prevailed.

Fourth, an Indian tribe is *sui juris.* Look at the *Tee-Hit-Ton* case, 348 U.S. 272, wherein plaintiff is described as an identifiable tribe of Indians, suing in the Court of Claims without a special jurisdictional act. Even the United Mine Workers, which to counsel's mind is the epitomy of an amorphous plaintiff, has standing in court, *United Mine Workers v. Coronado,* 259 U.S. 344.

Fifth, what do the phrases "this is not a property right but amounts to a right of occupancy which the

sovereign grants and *protects against intrusion by third parties * * * "* mean in the *Tee-Hit-Ton* case (348 U.S. 272, 279) and the *Duwamish* case (79 C. Cl. 530, 599)? The Court should give us some explanation and we feel we are entitled to chide the Court for failing to do so.

On oral argument we called the Court's attention to *Minnesota v. Hitchcock,* 185 U.S. 373, to show what the Supreme Court did in a conflict between what may be considered aboriginally-held lands on the one hand and school lands on the other. We have one new case which deserves consideration by the Court, namely, *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, wherein the tribe in its own right and without the aid of the United States as a party plaintiff protected its domain. True it is that one might disregard some of the language of the case and say that it is not an aboriginal rights case. but the quantum of property seems unimportant, as long as there is some quantum.

Sixth, we think it a novel doctrine that *res judicata* can be based and applied by the Court merely on filing a case in the Indian Claims Commission, and thereby foreclosing the Indians from taking an inconsistent position (assuming the allegations to be inconsistent) from such case.

Finally, we were disappointed in the failure of the Court in its opinion rationally to distinguish the phrases in the *Tee-Hit-Ton* and *Duwamish* cases and in the direct holding of the *Walapai* case, and now we add for the Court's consideration *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110. Once we establish that In-

dian title gives some sort of a property right, then the Fourteenth Amendment must protect the same, and thus, the Federal Courts can and must take jurisdiction of the lawsuit based thereon. As a corollary of the Court's present opinion, we must anticipate that if we should file an action in the state courts, we would be dismissed out also, because if these Indians have insufficient rights to be protected under the Fourteenth Amendment (thereby conferring jurisdiction on the Federal Courts) then the fact of the insufficiency of their property rights is established and the City of Tacoma would have no need to compensate the Indians under any theory.

We believe the full Court should hear this case and that the lower Court be reversed and the opinion heretofore entered herein be withdrawn.

WHEREFORE, appellant prays for a rehearing and that the same be before the full Court *en banc,* that the lower Court be reversed and the opinion heretofore filed herein be withdrawn.

Respectfully submitted,

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CERTIFICATE OF MERIT

The undersigned hereby certifies that he is a member in good standing of the Bar of this Court, and that the foregoing Petition is meritorious and not sought to delay this action.

FREDERICK PAUL